

LAVADA KAY TAYLOR
Claimant

ADAMS BUSINESS FORMS, INC.
Respondent

FEDERAL INSURANCE COMPANY
Insurance Carrier

ORDER

Respondent and its insurance carrier (respondent) requested review of the October 8, 2009, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Jeff S. Bliskey, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) granted claimant's request for medical treatment with Dr. Christopher Brodine, including but not limited to the brace suggested by Dr. Brodine.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 6, 2009, Preliminary Hearing and the exhibits, and the independent medical examination report of Dr. Peter Bieri filed with the Division on April 7, 2009, together with the pleadings contained in the administrative file.

Respondent contends that claimant's need for the medical treatment ordered by the ALJ did not arise out of and in the course of claimant's employment with respondent as a natural and probable consequence of her original injury of January 5, 2007.

Claimant requests the Board affirm the ALJ's preliminary hearing Order for Medical Treatment, arguing that her need for a left leg brace is directly related to her left lower extremity injuries suffered while employed at respondent.

The issue for the Board's review is: Did claimant's current need for medical treatment by Dr. Brodine, including a left leg brace, arise out of and in the course of her employment with respondent as a natural and probable consequence of her original injury of January 5, 2007?

FINDINGS OF FACT

Claimant testified that on January 5, 2007, she was pushing a cart at work that was loaded with paper. She was attempting to turn the cart around when one of the wheels got caught in a hole in the floor. She continued to try to turn the cart, but it had stopped. She then felt pain from the top of her head down. She is specifically claiming injuries to her left leg and ankle, stomach, and low back. Claimant testified that she immediately began having symptoms with her left foot, and she has had problems with her left leg since the injury. Her left leg will go numb and gets weak, and then her foot will drag. She had two EMG's, one on March 13, 2007, and another on June 29, 2007, that were positive for left peroneal entrapment in her leg.

A third EMG was performed on claimant on May 28, 2008, by Dr. Steven Hendler. The summary of that EMG indicates that "[n]erve conduction studies of the peroneal nerves show the left peroneal nerve to be normal in latency, conduction velocity and amplitude. There is no dropoff of amplitude or velocity across the fibular head."¹ Dr. Hendler commented:

The previously identified abnormalities consistent with peroneal neuropathy have now resolved. . . .

. . . .
Based on the previous evaluation and today's findings, the patient, in my opinion remains at maximum medical improvement. There is no evidence of foot drop nor is there indication for any additional treatment such as bracing or physical therapy.²

Claimant was examined by Dr. Michael Poppa on November 4, 2008, at the request of claimant's attorney. Dr. Poppa's report of that date does not mention that claimant has a foot drop, and claimant cannot remember if she mentioned to Dr. Poppa that she had a foot drop. Claimant complained to Dr. Poppa that at times, she will be walking when she will suddenly stumble. She reported to him that she had stumbled at work on March 22,

¹ P.H. Trans., Resp. Ex. A at 1.

² P.H. Trans., Resp. Ex. A at 2.

2007, and again on June 12, 2007. After examining claimant, Dr. Poppa found she had left peroneal neuropathy at the knee with denervation/neurpathic findings, pain/diathesis of the abdomen, and an aggravation of a preexisting degenerative condition involving her lumbar spine. He found she was at maximum medical improvement regarding her work-related accident of January 5, 2007.

Claimant fell at home on March 1, 2009. She testified that her whole leg suddenly went numb and she fell, fracturing her left ankle. As a result of the fracture, she was placed in a boot cast that went up to her knee. During cross-examination, claimant testified that this accidental fracture was not work related. However later, upon questioning by the ALJ, claimant stated that she believed her work-related injury caused the numbness that made her fall at home.

At the request of the ALJ, claimant was seen by Dr. Peter Bieri on March 23, 2009, for an evaluation, disability rating, and recommendations regarding future medical treatment. At the time of this evaluation, claimant was in the boot cast as a result of her fractured left ankle. Dr. Bieri's report indicated that she had swelling and discoloration to the ankle consistent with her recent injury. Her active range of motion of the foot and ankle were reduced, but he found it difficult to distinguish between peroneal neuropathy and the residuals of her current injury.

Dr. Bieri noted that claimant had been diagnosed with left peroneal neuropathy and possible foot-drop, mechanical low back pain and abdominal pain. He stated that claimant's diagnoses appeared to be reasonable, appropriate and consistent. He found her to be at maximum medical improvement as applied to the residuals of her work-related injury. This was independent of her ankle fracture.

On her own, claimant saw Dr. Christopher Brodine, who has recommended that she have an EFP or Arizona brace to help keep her foot up and stop her from dragging her foot. She testified that she went to her own doctor for treatment to her leg because she could not get treatment through workers compensation. To claimant's knowledge, Dr. Brodine is the only doctor who has recommended the foot brace she is requesting. Claimant said she continues to have difficulty walking because she drags her foot, which catches her toes on the ground.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

In *Jackson*,⁵ the Kansas Supreme Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

Claimant did not have a problem with her left leg or with walking before her accident at work on January 5, 2007. Her subsequent problems with ambulation, weakness, numbness and tingling in her left leg and foot, foot drop, and dragging of her left foot all relate to that accident at work. Her work-related injuries are also the most likely explanation for her subsequent falls and injuries, including her ankle fracture in March 2009. Claimant's need for additional medical treatment is a direct and natural consequence of her January 5, 2007, accident.

³ K.S.A. 2008 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁵ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

⁶ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁷ K.S.A. 2008 Supp. 44-555c(k).

CONCLUSION

Claimant's current need for the medical treatment recommended by Dr. Brodine is the direct result and natural consequence of personal injuries claimant suffered that arose out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated October 8, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge